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No. 10-926 JAN 17 2011

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In The

Supreme Court of the United States

ALVIN CLAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

The government alleged that Petitioner Clay and others conspired to commit wire fraud under 18 U.S.C. § 1343 by engaging in a scheme in which prospective *real estate buyers obtained financing* based on false representations that inflated the value of the properties purchased. The indictment charged that the scheme defrauded the purchasers because loan proceeds from the inflated property values were diverted to Clay's construction company for home repairs that were never performed.

Can a participant in a fraud scheme – an unindicted accomplice – properly be considered a *victim* of the fraud based on frustration in failing to obtain the anticipated benefits of the scheme, a question of first impression, or as the Eighth Circuit judge framed the issue during oral argument: "Crook steals from a crook – it's not a crime?"

II.

Petitioner's jury was instructed that guilt could be based on evidence showing there was a "high probability" that he had knowledge of the fraud scheme and, also, that jurors could infer guilty knowledge from his "willful blindness" to the actions of others who initiated and advanced the fraud scheme without his direct involvement.

QUESTIONS PRESENTED FOR REVIEW – Continued

Did the "high probability" and "willful blindness" language used in the jury instructions at Clay's trial impermissibly lessen the government's burden of proof with respect to Petitioner's knowledge of the illegal acts charged, violating the constitutional guarantee of due process of law?

TABLE OF CONTENTS

	Page
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	1
Statement of the Case	2
Procedural History	2
Summary of Material Facts	3
a. The Government's case	5
b. The defense case	7
c. The motion for new trial	8
Reasons for Granting the Writ	10
I. PETITIONER'S CONVICTION FOR CONSPIRACY TO COMMIT WIRE FRAUD UNDER 18 U.S.C. § 1343 WAS IMPROPER WHERE THE GOVERNMENT ALLEGED THAT THE COMPLAINANTS, WHO WERE PARTICIPANTS IN THE FRAUD SCHEME, WERE VICTIMIZED BY THE FACT THAT THEY DID NOT OBTAIN THE BENEFITS THEY EXPECTED FROM THE SCHEME	10
Summary of Material Facts	10
Argument and Authorities	14

TABLE OF CONTENTS – Continued

Page

II. PETITIONER CLAY WAS DENIED DUE PROCESS BASED ON INCLUSION OF "HIGH PROBABILITY" AND "WILLFUL BLINDNESS" INSTRUCTIONS IN THE JURY CHARGE WHICH IMPERMISSIBLY LESSENED THE GOVERNMENT'S BURDEN OF PROVING THAT HE *KNOWINGLY* CONSPIRED WITH OTHERS TO DEFRAUD PROPERTY PURCHASERS 21

Summary of Material Facts..... 21

Argument and Authorities 24

Conclusion and Prayer for Relief 35

Appendix

Opinion of the United States Court of Appeals for the Eighth Circuit in *United States v. Clay*, 618 F.3d 946 (8th Cir. 2010).....App. 1

Judgment of the United States District Court for the Eastern District of Arkansas in *United States v. Clay*, No. 4:04CR00274-01 JLH.....App. 24

Order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing En Banc and Petition for Rehearing in *United States v. Clay*, 618 F.3d 946 (October 20, 2010).....App. 36

Second Superseding Indictment, *United States v. Clay*, No. 4:04CR00274-01 JLH.....App. 37

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS

Abbott v. United States, 131 S.Ct. 18 (1995) 34

Bailey v. United States, 516 U.S. 137 (1995).....33, 34

Ratzlaf v. United States, 510 U.S. 135 (1994) 32, 33

Sullivan v. Louisiana, 508 U.S. 275 (1993).....35

Victor v. Nebraska, 511 U.S. 1 (1994) 23

FEDERAL CIRCUIT DECISIONS

United States v. Alston-Graves, 435 F.3d 331 (D.C. Cir. 2006).....27, 28, 29, 34

United States v. Carrillo, 435 F.3d 767 (7th Cir. 2006) 29, 30

United States v. Clay, 618 U.S. 946 (8th Cir. 2010) .....*passim*

United States v. Espinoza, 244 F.3d 1234 (10th Cir. 2001) 30

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., amend. V 1, 34

18 U.S.C. § 371 .....*passim*

18 U.S.C. § 924(c) 34

18 U.S.C. § 1343 .....*passim*

18 U.S.C. § 1957 .....3, 36

88 U.S.C. § 1254(1).....1

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1291 3

31 U.S.C. § 5313 32

OTHER AUTHORITIES

Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. Rev. 29 28

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eighth Circuit, *United States v. Clay*, 618 U.S. 946 (8th Cir. 2010) is appended to this petition. [App. 1-23].

JURISDICTION

This Court has jurisdiction pursuant to review the decision of the court of appeals pursuant to 28 U.S.C. § 1254(1). The court below affirmed Petitioner Clay's convictions on August 27, 2010, and denied the petition for rehearing en banc on October 20, 2010. A copy of the order denying rehearing is appended to this petition. [App. 36]. This petition is timely if filed on January 18, 2011.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of due process of law. . . .

Petitioner was convicted of conspiracy to commit wire fraud pursuant to 18 U.S.C. § 1343 which provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. . . .

The conspiracy statute, 18 U.S.C. § 371, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Procedural history

Petitioner Clay was convicted on a multi-count indictment alleging that he conspired with others to commit wire fraud under 18 U.S.C. § 1343 in violation

of 18 U.S.C. § 371 and four counts of violation of 18 U.S.C. § 1957. [Second Superceding Indictment, App. 37-60]. He was sentenced to five (5) months imprisonment and ordered to pay $16,265.26 in restitution. [Judgment, App. 24, 32]. He appealed the case to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291. Petitioner preserved his arguments raised in this petition in the district court and the Eighth Circuit, which affirmed in a published opinion, and denied rehearing and rehearing en banc.

Summary of Material Facts

Alvin Clay was initially charged with two named individuals, Ray Nealy and Donny McCuien, and others "known and unknown to the grand jury" with a fraudulent scheme to obtain real estate financing through use of false information to qualify for home loan mortgages. McCuien managed a Burger King outlet, owned a property management and construction company, and also worked as a loan originator. Nealy worked as a mortgage broker and owned a mortgage company. Clay, a licensed attorney in practice in Little Rock, held both a real estate license and a contractor's license. *Clay*, 618 F.3d at 949 [App. 2]. Clay was tried separately after McCuien entered into a plea bargain with the Government, agreeing to testify against Clay in return for charging concessions resulting in his plea only to the conspiracy count, with the money laundering counts being dismissed.

The fraud scheme alleged by the Government was conceived and initiated by McCuien and Nealy, who solicited individuals to apply for home mortgages on properties for sale located in Little Rock. Nealy assisted the prospective buyers in obtaining financing for more than the selling price. The difference in financing amount and sale price reflected renovation costs for work purportedly to be provided by Clay Construction Company. The evidence showed that each of the four purchasers (one, Linda Jones, purchased two homes with Nealy's assistance) knowingly provided false information of a material nature in the mortgage application process. The false information communicated to lenders in support of the applications included: overstated sales prices; false claims that a property would be the purchaser's primary residence; incorrect employment information; overstated monthly income; overstatements of purchaser's cash on hand; listing of non-existing assets. [App. 39 – Indictment, Count I, ¶ B 4(a)-(f)].

Clay's participation in the fraud scheme as explained by the Government, was essentially two-fold: First, Clay Construction Company invoices reflecting rehabilitation or renovation work on the properties purchased through the actions of Nealy and McCuien were used to direct funds obtained through the use of fraudulent documents to Clay Construction Company at the time of the real estate closings, although no work was ever performed on the properties. Second, Clay distributed the money obtained through use of

the invoices to Nealy, McCuien and himself. [App. 40-41, Indictment, Count I, ¶¶ B 7(d), 8, 9, 10, and 11].

Of the total sum of funds directed to Clay Construction Company, $133,142.23, Clay received approximately $27,500 from the five transactions. *Clay*, 618 F.3d at 949-50 [App. 3, 7].

a. The Government's case

The Government's case was based on a series of elements designed to tie Petitioner Clay to the fraud scheme hatched by Nealy and McCuien; to funds obtained from lenders as a result of the false representations contained on the loan applications submitted by Nealy and McCuien on behalf of the unqualified purchasers; to the invoices filed by Clay Construction Company for home repairs never performed; and finally, to the distribution of the proceeds of the loan funds to Nealy, McCuien and himself. It built its case primarily through the trial testimony of McCuien and documentation relating to the Clay Construction invoices and transfers of funds from Clay Construction to the three individuals.

Over defense objection, the prosecution initially showed that Clay had created Clay Construction Company prior to the beginning of the fraud scheme and had obtained his contractor's license through use of misrepresentations in his application. The prosecution then presented evidence concerning the fraud scheme, tying Clay to the home purchases through McCuien's testimony in which he denied that he had

any experience in property renovation and that Clay knew that he would not be performing any construction work for Clay Construction on the properties. McCuien testified that Nealy assisted him in creating a company called McCuien Property Management, but that he never had any intention of performing construction work and, in fact, denied that he had ever done any construction or renovation work. [T, 433-34]. He explained that Clay had never discussed hiring him to rehabilitate houses and denied that he had been hired to perform work for Clay Construction Company. [T, 435].

McCuien explained the scheme to purchase homes, testifying that he identified potential purchasers after residential properties were located that could be bought at low prices. McCuien induced the prospective buyers to seek loans to buy homes that could then be re-sold for profit, while Nealy assisted in obtaining financing. The scheme involved inflating actual sale prices with appraisals that would qualify for financing, fabricating loan applications to show that the purchasers would themselves qualify, and then assisting the purchasers through closing on the transactions. Estimates or invoices for rehabilitation of the properties, provided by Clay Construction Company, would then be used to divert loan proceeds in excess of the actual sale prices to the conspiracy at closing.

McCuien testified that checks made payable to Clay Construction at the real estate closings would be issued and that Clay would distribute the proceeds of

these transactions to Nealy, McCuien and himself. The case involved the purchase of five properties by four purchasers with $133,142.23 being the total amount of loan fund proceeds ultimately going to the three conspirators. Of this sum, the Government showed that Clay realized approximately $27,500 for his share of the diverted loan funds.

Each of the purchasers was paid by McCuien for their participation in the fraudulent purchases.

b. The defense case

Clay testified in his defense, denying that he was actually aware of the fraud scheme. He admitted forming Clay Construction in order to engage in a construction project with another individual that had been completed by subcontractors prior to meeting Nealy and McCuien. He met Nealy in 2001 while trying to put together financing to sponsor a boxing match. Later, Nealy moved his business, Ideal Mortgage, into office space shared with Clay.

Clay testified that he had no involvement in the purchase and sale of the five (5) houses, no dealings with the sellers, buyers, or borrowers, no involvement with securing the loans or dealing with the lenders or the title companies. He testified that he maintained copies of the invoices, settlement sheets, and check stubs; his principal concern was to assure that the amount received from the title company matched the amount of the invoice and the settlement statement [T, 988-89]. He provided these documents to his

CPA [T, 989-90], but paid little or no attention to the content of the invoices [T, 1042]. He also testified that he relied entirely on McCuien, whom he met through Nealy, as subcontractor, to perform any needed remodeling or repairs on the five houses [T, 1014-15], and knew nothing of Ideal's fraud [T, 1000]. No one ever informed him that the work on the houses had not been done [T, 1000].

The trial court refused to permit Clay to offer evidence in support of his claim that the Government had targeted him for prosecution in retaliation for his aggressive representation of a client in a federal criminal matter that had particularly upset the United States Attorney's office. The district court did not find the defense "frivolous" but excluded the evidence at trial, holding that it did not raise an issue for jury consideration. On appeal, the Eighth Circuit upheld the trial court's exercise of discretion. *Clay*, 618 F.3d at 956-57 [App. 19-21].

c. The motion for new trial

Following conviction, Clay moved for new trial on several grounds including newly-discovered evidence relating to McCuien. McCuien was the only witness to testify and implicate Clay directly at trial. As noted, his testimony included unequivocal denial of any experience in construction or agreement to perform renovation/rehabilitation work on the properties involved in the fraud scheme.

Evidence adduced at the hearing showed that, contrary to the testimony before the jury, McCuien was active in construction and home repair and in buying and selling homes [T, Vol. 11 at 93-95, 97-100, 165-73, 175-77; Vol. 12 at 220-27, 238-50, 251-59, 263-64, 265-70]. In addition to his company – McCuien Property Management and Construction – he was the principal in at least two other businesses involved in buying and selling homes and an additional construction business [T, Vol. 11 at 179-82; Vol. 12 at 200-04, 207-10, 221]. The evidence also revealed instances where he took money for a home repair and never performed the work. [T, Vol. 11 at 167-68; Vol. 12 at 227]. Numerous witnesses testified regarding McCuien's dishonest business practices in the home repair and home buying and selling business; all had a poor opinion of his honesty and one advised that his reputation in the community was that of an "habitual liar." [T, Vol. 11 at 99-100; Vol. 12 at 200-04, 235, 263-64, 265-70]. Following a hearing, the court denied the motions [DOC 374].

On appeal the Eighth Circuit upheld that trial court's denial of the new trial motion on the newly-discovered evidence ground, finding that the evidence did not warrant relief. The court concluded:

> At trial, McCuien testified he had no experience in construction. After trial, Clay presented the court evidence that McCuien actively participated in construction and home repair.

> But Clay's post-trial attack on McCuien's credibility merely amounts to impeachment evidence.

Clay, 618 F.3d at 952 [App. 10-11]. Moreover, the court below found that there was sufficient evidence of Clay's involvement in the financial transactions to warrant conviction despite the evidence of McCuien's false testimony at trial. Nevertheless, the evidence of McCuien's false trial testimony was sufficiently powerful to cause the Government to abandon its wire fraud case against co-defendant Nealy.

REASONS FOR GRANTING THE WRIT

I. PETITIONER'S CONVICTION FOR CONSPIRACY TO COMMIT WIRE FRAUD UNDER 18 U.S.C. § 1343 WAS IMPROPER WHERE THE GOVERNMENT ALLEGED THAT THE COMPLAINANTS, WHO WERE PARTICIPANTS IN THE FRAUD SCHEME, WERE VICTIMIZED BY THE FACT THAT THEY DID NOT OBTAIN THE BENEFITS THEY EXPECTED FROM THE SCHEME.

Summary of Material Facts

Petitioner Clay was originally charged as a conspirator in a scheme to defraud home mortgage lending institutions concocted by co-conspirators Nealy and McCuien. They solicited individuals who could not qualify for home mortgages and arranged financing for them, by providing these individuals funds sufficient to meet "cash on hand" requirements and

creating loan applications containing false information regarding employment, earnings, and intent to live in the property subject to purchase. They supported the loan applications with property appraisals that inflated the purchase prices for these properties and then diverted loan funds to the conspirators by paying invoices for renovation work on the property to be done by Clay Construction Company, owned by Petitioner. Clay then transferred most of the money he received following the loan closings to Nealy and McCuien.

The Government initially charged that Clay, Nealy and McCuien used the scheme to defraud lenders because estimates or invoices from Clay Construction Company were provided in support of the inflated purchase prices for the properties. In denying Clay's motion to dismiss, the district court noted:

> The indictment does not specifically mention a prior agreement between the defendants and either the buyers, sellers, or lenders that construction work was to be done on any of the homes. While the indictment is not a model of clarity in this regard, it reasonably can be read to allege that the invoices were material misrepresentations *meant to deceive the lenders*.

[Opinion and Order, DOC 127-2, filed 08/07/06, at 9, (emphasis added)].

However, once the evidence developed that not only had no lenders lost money in these transactions,

but that the Clay Construction Company renovation estimates had no bearing on their loan decisions, the Government altered its theory of the conspiracy and money laundering allegations. In the second superseding indictment the Government charged:

> C. THE SCHEME TO DEFRAUD
>
> From on or about August 2002 to on or about March 2003, in the Eastern District of Arkansas, and elsewhere, the defendants, ALVIN CLAY, RAYMOND NEALY, and Donny McCuien and others known and unknown to the Grand Jury, did combine, conspire, confederate and agree between themselves and others, known and unknown to the Grand Jury, to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises from the purchasers of the following homes:
>
> (1) 1614 South Park, Little Rock, Arkansas;
>
> (2) 1122 West 21st, Little Rock, Arkansas;
>
> (3) 6404 Dove Lane, Little Rock, Arkansas;
>
> (4) 10010 Chicot, Little Rock, Arkansas; and
>
> (5) 1611 West 16th, North Little Rock, Arkansas,

> by causing loan proceeds to be transmitted by means of wire fraud communications in interstate commerce from the lending institutions to the title companies in the Eastern District of Arkansas, for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343.

[App. 41-42].

Clay argued in his motions for directed verdict motion and new trial that the purchasers who were knowingly involved in the fraud scheme by agreeing to serve as purchasers could not then claim that they had been victimized by the fraud. Nevertheless, the Eighth Circuit rejected this argument on appeal, finding that they were, in fact, victimized, finding:

> The purchasers testified that they purchased the homes because McCuien told them they could make money in real estate and that several of them were harmed by the conspiracy. Further, McCuien admitted that the purchasers were never informed that the conspirators received money from the title companies and that they split the money amongst themselves. McCuien testified that they did not tell the purchasers because they wanted to keep the money for themselves. We conclude that the testimony supports the jury's verdict that McCuien, Nealy, and Clay engaged in a conspiracy to defraud the purchasers and that the purchasers were harmed by the conspiracy.

Clay, 618 F.3d at 951 [App. 8-9].

Argument and Authorities

Petitioner's research indicates that the question of whether a participant in a wire fraud scheme can properly be characterized as a "victim" of the scheme if the fraud fails to pay off as expected is one of first impression. At oral argument, a member of the panel framed Clay's issue succinctly: "Crook steals from a crook – it's not a crime?" *See* http://www.ca8.uscourts.gov/oralargs/oaFrame.html, [Oral argument of Petitioner's counsel, at 9:00 min. (April 16, 2010)].

In rejecting Clay's argument, the Eighth Circuit explained:

> Finally, Clay provides no authority for his proposition that the purchasers could not be the victim of a conspiracy to commit wire fraud. The substantive statute for wire fraud, 18 U.S.C. § 1343, does not specify who must be the victim of the wire fraud.

The court faulted Clay for not providing case law supporting his argument, but offered no authority supporting its conclusion either. The court then looked to the statute, finding no language expressly precluding an accomplice or willing participant in a fraud scheme from also being named as a complainant for criminal prosecution.

Clay agrees, as he must, that Section 1343 does not expressly prohibit the Government from charging that a fraud may be prosecuted upon showing that a participant in the fraud failed to be rewarded by the fraud as expected. But as a matter of policy, this approach virtually opens the door to unlimited

prosecution for fraud by naming collaborators as victim complainants, who may then be induced to testify in return for favorable plea agreements or decisions not to prosecute at all.

Although Section 1343 has been amended on a number of occasions, neither the text of the statute nor amendments expressly authorizes or precludes prosecution of some participants in a wire fraud scheme on the claimed losses of other participants. *See* 18 U.S.C. § 1343, Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722, and amended July 11, 1956, c. 561, 70 Stat. 523; Aug. 9, 1989, Pub.L. 101-73, Title IX, § 961(j), 103 Stat. 500; Nov. 29, 1990, Pub.L. 101-647, Title XXV, § 2504(i), 104 Stat. 4861; Sept. 13, 1994, Pub.L. 103-322, Title XXXIII, § 330016(1)(H), 108 Stat. 2147; July 30, 2002, Pub.L. 107-204, Title IX, § 903(b), 116 Stat. 805; Jan. 7, 2008, Pub.L. 110-179, § 3, 121 Stat. 2557. Nor does the legislative history demonstrate that Congress has ever addressed the use of the statute to prosecute some participants in the fraud scheme based on the claimed losses of other participants. 1952 Acts. House Report No. 1750, *see* 1952 U.S. Code Cong. and Adm. News, p. 2234; 1956 Acts. House Report No. 2385, *see* 1956 U.S. Code Cong. and Adm. News, p. 3091; 1989 Acts. House Report No. 101-54 (Parts I to VII) and House Conference Report No. 101-222, *see* 1989 Code Cong. and Adm. News, p. 86; 1990 Acts. House Report Nos. 101-681 (Parts I and II) and 101-736, Senate Report No. 101-460, and Statement by the President, *see* 1990 U.S. Code Cong. and Adm. News, p. 6472; 1994 Acts.

House Report Nos. 103-324 and 103-489, and House Conference Report No. 103-711, *see* 1994 U.S. Code Cong. and Adm. News, p. 1801.

Petitioner recognizes, of course, that the absence of clarifying language limiting the scope of prosecutions to vindicate the interests of innocent victims of the fraud scheme could support the Eighth Circuit's disposition. Similarly, the apparent lack of case law directly on point could suggest that this theory of prosecution is so obviously correct that it has never been challenged on appeal.

On the other hand, it is also reasonable to conclude that this theory of prosecution is so divorced from a realistic perception of Congressional intent that the Government has just not attempted to represent the interests of unindicted or unnamed co-conspirators, accomplices, or willing participants in fraud schemes as complainants in its prosecutions under Sections 371 and 1343.

The evidence at trial showed that the purchases of the five properties identified in the indictment involved individuals who would otherwise have been unable to qualify for loans for the homes, but who nevertheless agreed to participate in the transactions. Their trial testimony also showed that each understood that they were involved in transactions that involved misrepresentations on their part. The only purchaser who apparently suffered a cash loss was Linda Jones, who served as purchaser for two properties and whose loss is reflected in the trial

court's restitution order requiring the defendants to repay her $16,265.26. [Judgment, App. 31-32].

Linda Jones, however, was a knowing participant in the application process which was central to the fraud scheme described by the Government. Her trial testimony showed that she had retired from the Army after 28 years, attaining the rank of sergeant first class. [T, 568]. She was employed at the Burger King that McCuien managed and met Nealy there. She began to talk with McCuien about investing in real estate in 2002, wanting to invest in real estate to make more money. [T, 569-70]. McCuien found the first house she purchased, but she never went to see it because she had no intention of living in it. [T, 571]. She bought a second house a few months later. She testified she did not know what the selling price for these houses were until she went to closing, [T, 573], but that she expected to sell both houses quickly, but that if they did not sell, Nealy and McCuien had offered to rent them for her. [T, 575]. She admitted that each loan application form indicated that the houses would be used as a primary residence, which was false. [T, 576].

Linda Jones testified that she did not authorize anyone else to make false statements on the loan application, nor sign her name. She did explain that Nealy gave her $5,500 in cash to deposit in her account, returning that money to him that same day. She also stated that her monthly income had been inflated on the loan application, but not by her. [T, 579-80]. Jones admitted that she signed the loan

applications, although she felt pressured to do so. [T, 581]. She admitted, however, that she knew when she signed the closing documents that the statement that she intended to live in the home she was buying was false, but did so anyway because Nealy told her she would not get into trouble. [T, 586]. Her testimony on direct examination included the following exchange:

> Q: I'm going to ask you again. Why did you go to close a loan without knowing how much money the house cost?
>
> A: Because I had no intention of living there, and it was supposed to be a buy and sell.

[T, 587-88]. She then admitted that after the closing, McCuien gave her a money order for between $1,500 and $2,000 and that she knew that she was going to receive money after the closing. She denied that the money had any bearing on her decision to buy and that she accepted the money because she needed it. [T, 590-91]. Her ultimate losses were incurred as a result of deficiency when one property was foreclosed on by lenders, resulting in Jones being required to pay off the deficient sum. [T, 605-06].

Jones then testified to the second purchase, again admitting that she had no intention of living in that house, relating similar actions of Nealy and McCuien in facilitating the transaction. Nealy completed the loan application and gave her money to deposit in her credit union account, which she then immediately withdrew and returned to him. [T, 593-99]. She then

went to the closing, again testifying that she completed the process without even knowing the purchase price on the property she was buying. Jones was paid between $3,000 and $4,000 for her participation in the two property purchases. With respect to both purchasers, she denied any dealings or conversation with Clay and, further, testified unequivocally that she never contracted with Clay Construction to do any work on the houses she bought.

The Government conceded that each of the purchasers received money in return for their participation in the loan process, arguing that the conspirators paid these purchasers "a little over $10,000.00 in order to steal $133,142.23 from them." [Brief for the United States, at 36]. However, the object of the conspiracy was to obtain financing based on overinflated property values, and consequently, they were not the victims of a major theft, but the lenders, if there were losses, were the victims. Instead of being victims of this theft, they were actually, participants in the scheme who did not gain as much as they might have liked.

Even the circuit court did not quantify the purported "theft" of loan proceeds suffered by the purchasers, likely recognizing that they were simply not entitled to economic gain based on their participation in the fraudulent scheme. Instead, the court characterized their loss as flowing from the fact that they wanted to make money in real estate, but found that they would not be able to do so: "The purchasers testified that they purchased the homes because McCuien

told them *they could make money in real estate and that several of them were harmed by the conspiracy.*" The court did not specify what type of harm they actually did suffer.

More importantly, the circuit court did not explain how the purchasers could have suffered any legally-cognizable loss by being unable to make money in real estate when they were not financially qualified in any event to make legitimate property purchases on the facts presented at trial. Because they had no lawful or legitimate expectation of becoming successful real estate investors without the resources necessary to qualify for the borrowing power upon which these transactions could have been properly pursued, there simply was no right to claim injury on these facts.

The Government's theory in prosecuting this scheme as conspiracy to commit wire fraud was so expansive as to defy sound policy. Criminal statutes are not adopted to protect the interests of other actors in criminal transactions. Here, the prosecution's case exceeded a reasonable reading of the Congressional intent implicit in Sections 371 and 1343 and represents a dangerous expansion of prosecutorial discretion in charging criminal cases. The Government could have proceeded on its fraud charge without proof that any lender had suffered loss and apparently, done so successfully on the facts of this case because the scheme was actually calculated to defraud lenders through the use of false representations on the loan applications. Yet here, the Government

altered its theory to fit facts that deviated from a reasonable use of the statutes.

In this apparent case of first impression, the Court should grant certiorari to consider this unusual theory of prosecution and determine whether it is appropriate to characterize participants in a fraud scheme as victims of that same scheme for purposes of identifying complainants in a criminal prosecution.

II. PETITIONER CLAY WAS DENIED DUE PROCESS BASED ON INCLUSION OF "HIGH PROBABILITY" AND "WILLFUL BLINDNESS" INSTRUCTIONS IN THE JURY CHARGE WHICH IMPERMISSIBLY LESSENED THE GOVERNMENT'S BURDEN OF PROVING THAT HE *KNOWINGLY* CONSPIRED WITH OTHERS TO DEFRAUD PROPERTY PURCHASERS.

Summary of Material Facts

The Government's theory of the case at trial was that Clay conspired with McCuien and Nealy to commit fraud in a scheme in which false information was deliberately used to obtain financing from residential lenders based on inflated values of the properties mortgaged. The victims of the fraud, according to the theory advanced in the second superseding indictment were not the lenders, but the purchasers who were themselves knowingly involved in supplying the false information. At trial the defense argued strenuously against inclusion of an instruction on

"willful blindness" because it would permit conviction on less than affirmative proof that Clay knowingly participated in the scheme. Despite expressing serious reservations about inclusion of the instruction, the trial judge overruled the objection and charged the jury on "willful blindness."

The instruction given by the trial court read, as follows:

> You may find that Alvin Clay acted knowingly if you find beyond a reasonable doubt that Alvin Clay was aware by a high probability that money or property was being obtained under false or fraudulent pretenses and that he deliberately avoided learning the truth. The element of knowledge may be inferred if Alvin Clay deliberately closed his eyes to what would have otherwise been obvious to him. You may not find Alvin Clay acted "knowingly" if you find he was merely negligent, careless, or mistaken as to whether money or property was being obtained under false or fraudulent pretenses.
>
> You may not find Alvin Clay acted knowingly if you find that he actually believed that money or property was not being obtained under false or fraudulent purposes.

Clay, 618 F.3d at 952 [App. 11; DOC 248, at 23; Tr. 1129-30].

On direct appeal, the Eighth Circuit rejected Clay's challenge to the jury instructions on both the "high probability" and "willful blindness" grounds,

treating these as separate objections. *Clay*, 618 F.3d at 953-54 [App. 12]. With respect to the argument that the "high probability" instruction diluted the concept of "reasonable doubt," the court concluded that the instruction did not compromise the burden of proof beyond a reasonable doubt as a matter of constitutional error, relying on *Victor v. Nebraska*, 511 U.S. 1, 6 (1994):

> This instruction did not merely require that the jury find a "high probability" that Clay committed the offenses. Rather, the instruction stated that *the jury must find beyond a reasonable doubt* "that Alvin Clay was aware of a high probability" that money was being fraudulently obtained.

618 F.3d at 953 [App. 13] (emphasis added).

With respect to the "willful blindness" instruction, the court observed that the district court had noted two different facts that warranted the instruction: first, that invoices showed that Clay had supervised construction when, in fact, no construction had been done; and second, that in the first transaction, Clay had given Nealy cashier's checks made out to Nealy's mother from the proceeds of the transaction, rather than paying subcontractors or materialmen, quoting the district judge: "the sort of thing that not inquiring about that seems to me evidence that would support giving that instruction." 618 F.3d at 954 [App. 15]. The court then concluded: "Based on these facts, we agree with the district court that a jury could reasonably conclude that Clay either knew of

the illegal activity or buried his head in the sand. Therefore, the court did not abuse its discretion in providing a willful blindness instruction." *Id.* [App. 16].

Argument and Authorities

The combined effect of the instructions on "high probability" and "willful blindness" impermissibly lessened the Government's burden of proof with regard to a key element of the case, that Petitioner Clay had knowledge of the conspiracy and its aims. Based on the deliberate shift in the Government's theory of the case implicit in the second superseding indictment, Clay's knowledge had to involve the intent to defraud the purchasers who participated in the fraudulent scheme, rather than the lending institutions that suffered no loss as a result of the transactions.

The evidence showed, however, that Clay had no contact at any point in time with the purchasers and did nothing to facilitate their involvement in the scheme. It also showed that the lenders did not rely on renovation estimates prepared by Kenny Wright, in making their lending decisions. Wright, a tax preparer, cooperated with the FBI in providing information concerning Clay's business activities once he became concerned over his own possible liability. He prepared Form 1099's for Clay and also – at Nealy's direction – renovation estimates, as his testimony at the pretrial hearing on Clay's suppression motion showed.

The instructions effectively advised Petitioner's jury that his knowledge could be inferred if the evidence showed *beyond a reasonable doubt* that there was a high probability that he was aware of the fraud. The circuit court concluded that there was no dilution of the burden of proof because the instructions required this finding to be based on evidence sufficient to convince jurors beyond a reasonable doubt. But the court did not address what actually had to be proved by that standard. Instead of jurors being told that they must find that Clay had actual knowledge of the fraud, conviction was authorized on a finding that his knowledge was highly probable.

Neither Section 371, the conspiracy statute under which Clay was convicted, nor the wire fraud statute, Section 1343, contemplates conviction based upon a "high probability" of knowledge relating to the existence of the conspiracy or its intended goal of using wire transfers to fraudulently obtain money. This expansive approach to knowledge effectively diluted the prosecution's burden of proving Clay's knowing participation in a scheme to defraud the purchasers of the properties.

A different inference might have been drawn had the intent of the conspiracy been to defraud lenders, in which event Clay's limited participation in the transactions involving McCuien and Nealy might have been sufficient for jurors to reasonably infer both his knowledge and intent of the conspiracy and scope of the fraud. However, the lenders' own admissions that the Clay Construction Company estimates

for renovation of the properties in question had no bearing on lending decisions apparently led the Government to develop the alternate theory that it was the purchasers who were, in fact, defrauded. In changing its theory of the case, the Government theoretically complicated its burden of proof, but the expansive instruction relating to proof of Petitioner's knowledge effectively permitted the Government to prove its case with evidence sufficient to prove only an undefined "high probability" that Clay had the knowledge required for conviction.

The "high probability" of knowledge that jurors were required to find was then further compromised by the "willful blindness" instruction. It permitted them to find Petitioner's guilt based on their conclusion that if he did not know that McCuien and Nealy were defrauding the home purchasers (their unindicted accomplices or, at a minimum, knowing participants in the fraud scheme themselves), it was because Clay simply did not want to know.

The "willful blindness" instruction has traditionally been used with caution in federal trials and the District Judge expressed his concern about its inclusion during the instructions conference, finally concluding that it was warranted by the evidence noted by the circuit court in its opinion. This instruction, commonly used in the circuits, has drawn strong criticism and even when approved, has been treated with caution. Two fairly recent circuit decisions illustrate this concern.

The District of Columbia Circuit Court virtually condemned the instruction in *United States v. Alston-Graves*, 435 F.3d 331 (D.C. Cir. 2006). This case also arose in the context of a wire fraud prosecution involving financial transactions based on false information, although a far more complex scheme with evidence of far more direct involvement by the defendant in the transactions than that linking Clay to the Nealy-McCuien bogus home purchases. *Id.* at 333-36. The extent of evidence characterized by the D.C. Circuit Court as "overwhelming" in showing the accused's involvement in the scheme, in fact, prompted the court to question:

> "Why in the face of this mountain of evidence the prosecution sought, and the district court gave over a defense objection, a willful blindness instruction is difficult to fathom."

435 F.3d at 337.

The *Alston-Graves* Court then addressed the "willful blindness" instruction generally, terming it "problematic," observing:

> The court then instructed that "a person's knowledge of a particular fact may be shown from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact." It makes obvious sense to say that a person cannot act "knowingly" if she does not know what is going on. To add that such a person nevertheless acts "knowingly" if she intentionally does not know what is going on is something else again.

The court relied on the following assessment in explaining the heart of its concern:

> Liability was not predicated on a finding of knowledge, but rather on a particular explanation of *why* the defendant remained ignorant. But it is hard to see how ignorance, from whatever cause, can *be* knowledge. A particular explanation of why a defendant remains ignorant might justify treating him as *though* he had knowledge, but it cannot, through some mysterious alchemy, convert ignorance *into* knowledge. (emphasis in original).

citing Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 Wis. L. Rev. 29, 52. *Id.* at n.1

Noting that all federal circuits use "willful blindness" instructions, the D.C. Circuit Court proceeded to thoroughly describe the range of offenses in which the instructions have been used; varying rationales offered in support of the instruction; alternative wording of the instructions actually given; and limitations on use. 435 F.3d at 338, nn.2-5, respectively. Reviewing conceptual problems in use of an instruction in which criminal culpability may be predicated on something amounting to mere negligence or recklessness in a civil context, *id.* at 339-40, n.7, the court then noted decisions in which other circuits had expressed reservations or cautioned about use of the instruction. *Id.* at 340-41, nn.10-14.

The *Alston-Graves* Court declined to reverse despite its reservations about the inclusion of the "willful blindness" instruction. First that lack of a trial objection required review for plain error and finding that use of the instruction could not be considered plain error because of the widespread use of the instruction in the circuits. Second, the court found that there was no prejudice to the accused because of the overwhelming evidence of guilt at trial, so much evidence that the court questioned why the trial court would have found the instruction warranted. 435 F.3d at 341-42.

In Petitioner's case, in contrast, the objection to the "willful blindness" instruction was preserved at trial and the trial court itself noted that the evidence was not overwhelming, resting its decision to instruct on the two specific facts mentioned by the Eighth Circuit in affirming noted earlier in the argument.

In *United States v. Carrillo*, 435 F.3d 767 (7th Cir. 2006), the court distinguished between two scenarios upon which a "willful blindness" – "ostrich" instruction might be given, the first involving deliberate physical avoidance of the place and time at which an offense, such as a drug deal, is being committed. The second, "lies in distinguishing between a defendant's mental effort of cutting off curiosity, which would support an ostrich instruction, and a defendant's simple lack of mental effort, or lack of curiosity, which would not support an ostrich instruction." *Id.* at 780. The key, according to the court, rests

on the question of whether the accused did anything to actively prevent the truth from being revealed to him. *Id. See also United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001) (requiring evidence that accused "purposely contrive to avoid learning all the facts in order to have a defense"). The court recognized that the problem with the instruction is that it threatens to do away with the requirement for proof of *mens rea*, relieving the prosecution of its burden of proving its case beyond a reasonable doubt by permitting to conviction based merely on the accused's negligence. *Id.* at 781.

The *Carrillo* Court then explained that use of the instruction should not be predicated on a reasonable man test, that is, whether a reasonable person would have inquired about the circumstances, but rather whether the accused deliberately "shut his eyes" to those circumstances. *Id.* at 782. The problem with this formulation, or indeed, any other test used to assess when deliberate ignorance or "willful blindness" is appropriate is that it presupposes, as the circuit court did, that criminal culpability can necessarily be predicated on a failure to act in any circumstance absent a legal duty to act to prevent an offense.

The trial court did instruct Petitioner's jury that his conviction could not rest on negligence, but in instructing jurors that they could convict on proof of a "high probability" of his knowledge, it misplaced the burden of proof initially by permitting conviction on less than the degree of certainty demanded by the reasonable doubt test to something else – a "high

probability" that Clay knew that the fraud scheme was directed at the purchasers. The charge then advised jurors that they could base a finding of guilt on evidence that Petitioner willfully failed to investigate the circumstances of the mortgage transactions.

But here the evidence showed that Clay had no relationship or contact with the purchasers whatsoever and no reason to believe that they were the objects of the fraudulent scheme. In fact, all were apparently paid from the closing proceeds initially for their participation and the court's restitution order identified only one purchaser, Linda Jones, as suffering any loss requiring compensation. The record, however, showed that the loan applications were supported by appraisals, and Clay's only involvement in the transactions appears to have been in distributing the money paid at closing to Nealy, McCuien and himself.

In the instant case, the trial court specifically instructed that Clay's conviction was not proper if he was "merely negligent, careless, or mistaken" as to whether the property or money was being obtained fraudulently. But the instructions cast this question in terms of a "high probability" that he actually knew, then permitted jurors to convict if they concluded that he did not know because he deliberately chose to remain ignorant, acting with "willful blindness."

Conviction could rest on either a high probability that he knew, or if the evidence did not support this high probability, if jurors believed he deliberately

avoided that high probability. In any event, the instructions converted the Government's burden of proof from one of showing Clay's affirmative participation in a scheme designed to defraud purchasers, rather than lenders, to a showing that Clay omitted to perform some duty he had to act to learn about the fraud scheme.

The constitutional flaw inherent in the use of the "willful blindness" instruction is that with respect to the offenses alleged under Sections 371 and 1343, it imposed liability for failure to affirmatively act, or based on an omission. Neither statute reflects Congressional intent to impose a legal duty on an individual such that failure to act is culpable and subject to prosecution under the law.

Petitioner relies on *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994), where the majority held that proof of a violation of 31 U.S.C. § 5313, which prohibits the structuring of a cash financial transaction to avoid the reporting requirement, requires strict proof that the accused acted willful in deliberately acting to avoid the reporting requirement with knowledge that this action is illegal. In discussing the burden of proof, the Court noted that some statutes create legal duties resulting in criminal liability for omission, *id.* at 146-47 (statute created legal duty not to circumvent reporting requirement). In *Ratzlaf*, the precise issue involved proof of willfulness in the commission of the offense as opposed to the question in the instant case raised by the "willful blindness" instruction, of course, but in both, the issue involves

the effect of an omission, failure to perform a legal duty. Where the statute created a legal duty not to commit an act, willful violation required proof in *Ratzlaf* that the defendant did act with the requisite knowledge of the duty. Here, by way of comparison, the instruction effectively permits the Government to impose a duty upon the individual to affirmatively discern the criminal intent of others involved in the financial transaction, including their intended purpose.

The inferred legal duty to determine whether Nealy and McCuien acted with intent to defraud the purchasers implicit in the "willful blindness" instruction served to expand liability beyond that contemplated by the language of Sections 371 and 1343, which require intentional participation in a criminal scheme and, particularly, a fraud. The use of these instructions that permit jurors to speculate on the accused's state of mind by authorizing conviction on a "high probability" of actual knowledge or deliberate ignorance impermissibly lessens the Government's burden of proof.

Similarly, when addressing a general expansion of the theory of criminal liability in widespread use by the circuits to authorize conviction for "possession" of a firearm during the commission of a drug trafficking offense, rather than strictly defining the prosecution's burden of proof to "use" of the firearm, this Court in *Bailey v. United States*, 516 U.S. 137, 142 (1995) rejected the rationale used by the circuits in expanding upon the language used by Congress in the

statute under review, 18 U.S.C. § 924(c). Subsequently, Congress addressed *Bailey* by amending the statute to criminalize "possession" in such circumstances. *See e.g.*, *Abbott v. United States*, 131 S.Ct. 18, 25 (1995) (recognizing 1998 amendment).

Here, as in *Bailey*, expansion of the criminal liability beyond that strictly defined by Congressional language through the use of jury instructions that ease the Government's burden of proof should be corrected. The extensive use of the "willful blindness" instruction noted by the court in *Alston-Graves* demonstrates that this issue is one of national importance involving the practices in most, if not all, of the circuits.

The use of the "willful blindness" and "high probability" instructions, particularly when considered as a whole, served to reduce the Government's requirement under the Fifth Amendment that its proof meet the reasonable doubt standard. Instead, the court's charge in this case allowed the jury to infer Petitioner's guilty knowledge based on an undefined standard – "*high* probability" – and an inference that if the evidence failed to meet the high probability test, that jurors could infer that Petitioner deliberately contrived to avoid knowledge of the illegality involved in the transactions.

The breadth of expansion of culpability implicit in the "willful blindness" instruction is not limited to the discrete facts of this case, moreover. It permits a finding of criminal liability on a range of actors

who would not otherwise be liable under a theory of knowing participation in a criminal conspiracy, particularly in matters involving financial transactions. "Willful blindness," for instance, would warrant prosecution for corporate officers, even non-officer employees, or governmental regulators, based on a failure to investigate financial dealings in business or other practices once some evidence of irregularity surfaces. Had Congress intended such a broad exposure for criminal liability, it certainly would have clarified this intent by appropriate statutory language. It did not do so and the "willful blindness" instruction serves as a constitutionally-impermissible means for the Government to expand that scope of liability.

In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), the Court affirmed that a jury instruction that lowers the burden of proof constitutes prejudicial error. This principle should now be applied in examining the instructions given at Petitioner's trial that diluted the Government's burden of proof, essentially inviting jurors to speculate as to what Clay probably knew or should have taken action to know regarding the actions of McCuien and Nealy and their intent to defraud the cooperating purchasers of the property.

CONCLUSION AND PRAYER

The Government's decision to change the focus of the conspiracy/wire fraud prosecution to the

unqualified purchasers of the properties which were the subject of the evidence of the fraud scheme developed at trial changed the dynamics of proof and culpability in this case. While the prosecution could have likely proceeded to conviction on the criminal conspiracy count regardless of whether the lenders actually suffered financial losses as a result of the scheme hatched by Nealy and McCuien, it elected to proceed on a theory in which accomplices were cast as victims of their scheme.

Because Congress neither intended, nor used specific language in Sections 371 and 1343 to provide for criminal liability when a willing participant in a fraud scheme complains that they were deprived of the benefits of the fraud, Petitioner Clay's conviction on the fraud count should be set aside. The circuit court rejected his attack on the money laundering counts, finding that the evidence showed that he knowingly participated in a transaction involving "criminally derived property" in violation of 18 U.S.C. § 1957. *Clay*, 618 F.3d at 952, n.4 [App.10, n.4]. If the conspiracy conviction cannot properly rest on fraud committed on an unnamed co-conspirator, accomplice or willing participant in the fraud, then that court's conclusion must be re-examined in terms of its characterization of the money involved as being "criminally" derived.

Petitioner prays the Court grant the writ and summarily reverse the judgment of the court below and remand this cause for further proceedings with respect to his convictions on the money laundering

counts. Alternatively, Petitioner moves the Court grant the writ, order briefing on the merits of his arguments, and set this cause for argument before the Court and for other relief to which he is entitled.

Respectfully submitted this 18th day of January, 2011.

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618 F.3d 946

United States Court of Appeals,
Eighth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Alvin CLAY, Defendant-Appellant.
No. 09-3134.

Submitted: April 16, 2010.
Filed: Aug. 27, 2010.
Rehearing and Rehearing En Banc
Denied Oct. 20, 2010.

Shirley Baccus-Lobel, argued, Dallas, TX, for appellant.

Steven Northup Snyder Sr., AUSA, argued, Fort Smith, AR, for appellee.

Before LOKEN, BRIGHT, and MELLOY, Circuit Judges.

PER CURIAM.

A jury convicted Alvin Clay of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, and four counts of money laundering in violation of 18 U.S.C. § 1957. The district court[1] sentenced him to five months' imprisonment and ordered him to pay $16,265.26 in restitution. Clay appeals, challenging the sufficiency of the evidence to support his convictions. He also argues the district court erred: (1) by

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[1] The Honorable J. Leon Holmes, Chief Judge, United States District Court for the Eastern District of Arkansas.

denying his motion for a new trial; (2) in its jury instructions; (3) in admitting evidence; (4) in excluding evidence; and (5) in denying his motion to suppress. We affirm the judgment of the district court.

I. Background[2]

This case concerns a conspiracy to defraud purchasers of five homes in Little Rock, Arkansas. The government charged three individuals for their roles in the conspiracy: Clay, Raymond Nealy, and Donny McCuien (collectively referred to as "the conspirators"). During the period of the conspiracy, Clay worked as a licensed attorney in the State of Arkansas and also held a real estate and contractor's license. Nealy worked as a mortgage broker and owned a mortgage company. McCuien managed a Burger King and owned a property management and construction corporation.

Each of the five fraudulent home purchases proceeded in a similar manner. Usually McCuien would find a purchaser for an inexpensive residential property. The purchaser would be promised a no-risk transaction, wherein he or she would receive some cash from closing. Nealy would then obtain financing in an amount substantially greater than the asking

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[2] "We recite the facts in the light most favorable to the jury's verdicts." *White v. McKinley*, 605 F.3d 525, 528 (8th Cir.2010) (quoting *United States v. Hayes*, 574 F.3d 460, 465 (8th Cir.2009)).

price. Using fraudulent information and frequently forging signatures, he would arrange for appraisals of the homes and prepare contracts for sale. The contracts showed a sale price greater than the asking price. The difference between the asking price and sale price would go to Clay Construction Company for the renovation of the property.

At closing, the conspirators would fax a Clay Construction invoice to the closing agent, even though the work claimed on the invoice had not been completed. The invoice showed a difference between the amount loaned to the borrower and the amount paid to the seller. The closing agent would send Clay Construction Company a check for the invoice amount. In total, the conspirators submitted five invoices to title companies, and title companies subsequently issued five checks to Clay Construction totaling $133,142.23. Clay received the checks, deposited them into Clay Construction's bank account, and divided the money among Nealy, McCuien, and himself. The conspirators did not complete any work on any of the homes.

The FBI learned of this scheme when Kenny Wright, a tax preparer, became concerned that he had unlawfully assisted the conspirators with preparing false documents. Wright, accompanied by his attorney, approached the government, admitting that he had falsified tax documents and participated in the fraudulent scheme by preparing false construction invoices. Wright provided the FBI with the conspirators' names, the names of the conspirators' businesses,

Clay's social security number, and documentation of the illegal activity.

FBI agents subsequently executed a search warrant for Clay's law office and Nealy's mortgage company, seizing twenty boxes of documents and seven computers. As a result of the search, the government sought a federal grand jury indictment.

The grand jury returned an indictment in December 2004, a first superseding indictment in November 2005, and a second superseding indictment in June 2007. The second superseding indictment alleged that Nealy and McCuien solicited individuals to purchase five homes and used fraudulent documentation when applying for financing through Nealy's mortgage company. According to the indictment, the conspirators caused false offers to purchase and false invoices to be delivered to the title companies. The invoices claimed that work had been completed on the homes, even though no work had been done. It also alleged that Nealy and Clay had defrauded the purchasers of the five homes.[3]

Before trial, Clay moved to suppress evidence seized in the search of his office and to dismiss the indictment on the grounds that it failed to state an

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[3] The second superseding indictment only named Clay and Nealy as defendants. McCuien pled guilty before the return of the second superseding indictment. McCuien was named as a coconspirator, along with other persons known and unknown to the grand jury.

offense and was the product of prosecutorial retaliation. In support of his retaliation claim, Clay alleged he had been involved in a contentious litigation with the same prosecutor who initiated the criminal investigation of Clay. After Clay filed these motions, the Western District of Arkansas assumed responsibility for the Eastern District of Arkansas's case. Following a hearing, the district court denied Clay's motions.

The government tried Clay separately from Nealy. More than thirty witnesses testified during the seven-day trial. The court denied Clay's motions for judgment of acquittal at the close of the government's case-in-chief and at the close of the trial. After the jury returned a guilty verdict, Clay moved for a judgment of acquittal and for a new trial. The district court held a hearing on these motions. At the hearing, Clay argued that McCuien had perjured himself at trial. The district court denied both motions. Clay appeals his convictions.

II. Sufficiency of the Evidence

Clay argues the government failed to introduce sufficient evidence to support the conviction for conspiracy to commit wire fraud.

This court reviews sufficiency of the evidence de novo and reverses only if no reasonable jury could have found the defendant guilty. *United States v. Elzahabi*, 557 F.3d 879, 885 (8th Cir.2009). "Evidence is sufficient to sustain a conviction if, when viewed in the light most favorable to the government, it offers

substantial support for the verdict." *United States v. Slaughter,* 128 F.3d 623, 627 (8th Cir.1997). "It is axiomatic that we do not pass upon the credibility of witnesses or the weight to be given their testimony." *Id.* (citations and quotations omitted).

To convict Clay of conspiracy to commit wire fraud, the government needed to prove: "(1) a conspiracy with an illegal purpose existed; (2) [Clay] knew of the conspiracy; and (3) [Clay] knowingly joined and participated in the conspiracy." *United States v. Price,* 542 F.3d 617, 620 (8th Cir.2008).

Clay raises two arguments. We address each in turn.

A.

Clay first argues he did not participate in the delivery, nor did he know about the fraudulent documents Nealy and McCuien sent to lenders and title companies. Clay maintains that he was only connected to the lenders through the Clay Construction invoices which he contends were immaterial to the lenders' decisions to loan money to the purchasers. Therefore, he argues, no loan proceeds were transmitted by wire communications as a result of his involvement.

We disagree with Clay that he needed to be directly involved in the transmission of loan proceeds from the lenders to the title companies. To be guilty of a conspiracy, he need not have knowledge of every

detail of the conspiracy. Rather, the government needed to establish that the participants agreed to the essential nature of the conspiracy. *See Slaughter,* 128 F.3d at 628 (requiring that the government prove that the defendant knew the essential object of the conspiracy).

The government introduced evidence that Clay received $27,500 as a result of his partnership with McCuien and Nealy, yet he did not complete any work on any of the homes. Clay admitted at trial that he listed himself as the "supervisor" of a construction project on one of the Clay Construction invoices that the conspirators sent to a title company even though he was not present on any job sites, nor did he supervise any subcontractors or workers. The evidence further established that the title companies relied on these invoices to send a check to Clay Construction for the difference between the amount loaned to the borrower and the amount paid to the seller, and Clay admitted that he bore responsibility for the invoices. Clay then deposited the checks from the title companies into his Clay Construction Company checking account and immediately wrote checks to himself, Nealy, and McCuien.

Clay may not have known every detail of the conspiracy. But the law does not require such knowledge. *See Blumenthal v. United States,* 332 U.S. 539, 557, 68 S.Ct. 248, 92 L.Ed. 154 (1947) ("[T]he law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it,

without requiring evidence of knowledge of all its details or of the participation of others."). The evidence, taken in the light most favorable to the verdict, showed that Clay intended to assist McCuien and Nealy with defrauding others out of money, he knew the essential object of the conspiracy, and that it was reasonably foreseeable that interstate wire communications would be used. *See Slaughter,* 128 F.3d at 627 (providing for the insufficiency of the evidence standard). We reject Clay's sufficiency of the evidence claim.

B.

Clay next argues that the government failed to prove he conspired to commit wire fraud because the government only proved that he defrauded the purchasers. He asserts that the purchasers were not victims because they knowingly participated in the fraud by falsely representing their intention to live in the homes they were purchasing and provided false information about their finances.

But the purchasers' testimony negates Clay's claim. The purchasers testified that they purchased the homes because McCuien told them they could make money in real estate and that several of them were harmed by the conspiracy. Further, McCuien admitted that the purchasers were never informed that the conspirators received money from the title companies and that they split the money amongst themselves. McCuien testified that they did not tell

the purchasers because they wanted to keep the money for themselves. We conclude that the testimony supports the jury's verdict that McCuien, Nealy, and Clay engaged in a conspiracy to defraud the purchasers and that the purchasers were harmed by the conspiracy.

Finally, Clay provides no authority for his proposition that the purchasers could not be the victim of a conspiracy to commit wire fraud. The substantive statute for wire fraud, 18 U.S.C. § 1343, does not specify who must be the victim of the wire fraud. The statute states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The government charged Clay with conspiracy to commit wire fraud, and the second superseding indictment clearly states that the conspirators engaged in a scheme to defraud *the purchasers* of the homes. Because Clay has not established he must defraud a lender to be found guilty of the conspiracy, and the evidence clearly establishes that purchasers

suffered harm as a result of the conspiracy, we reject Clay's argument and affirm the conviction for conspiracy to commit wire fraud.[4]

III. Motion for a New Trial

Clay argues the district court erred in denying his motion for a new trial because McCuien testified against him and McCuien lacked credibility. At trial, McCuien testified he had no experience in construction. After trial, Clay presented the court evidence that McCuien actively participated in construction and home repair.

But Clay's post-trial attack on McCuien's credibility merely amounts to impeachment evidence. "[N]ewly discovered evidence which is merely impeaching normally cannot form the basis for a new trial." *United States v. Bonadonna,* 775 F.2d 949, 957 (8th Cir.1985). Further, the district court determined that a jury could infer that Clay participated in the conspiracy based on reasons unrelated to McCuien's testimony: (1) Clay had complete control over the

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[4] Clay argues in a footnote that this court should set aside the money laundering convictions on insufficient evidence grounds, but he does not explain what elements the government failed to prove. We have carefully reviewed the record and are satisfied that the government proved that Clay knowingly engaged or attempted to engage in a monetary transaction in criminally derived property of a value greater than $10,000, and that the property was derived from unlawful activity. *See* 18 U.S.C. § 1957.

$133,142 he deposited into the Clay Construction account; (2) the manner in which the conspirators distributed the proceeds indicated that no work had been done on the five houses; and (3) none of the indicia of a legitimate construction project were present. We conclude the district court did not abuse its discretion in denying Clay's motion for a new trial. *See United States v. Huerta-Orozco*, 272 F.3d 561, 566 (8th Cir.2001).

IV. Jury Instruction

The district court instructed the jury on whether Clay acted knowingly:

> You may find that Alvin Clay acted knowingly if you find beyond a reasonable doubt that Alvin Clay was aware of a high probability that money or property was being obtained under false or fraudulent pretenses and that he deliberately avoided learning the truth. The element of knowledge may be inferred if Alvin Clay deliberately closed his eyes to what would otherwise have been obvious to him. You may not find Alvin Clay acted "knowingly" if you find he was merely negligent, careless, or mistaken as to whether money or property was being obtained under false or fraudulent pretenses.
>
> You may not find that Alvin Clay acted knowingly if you find that he actually believed that money or property was not being obtained under false or fraudulent purposes.

Clay argues this instruction requires reversal for two reasons.[5]

A. Reasonable Doubt

First, Clay contends the instruction undermined the reasonable doubt standard, because the use of the phrase "aware by a high probability" misled the jury on the definition of "reasonable doubt."

The term reasonable doubt "defies easy explication." *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). The Supreme Court explained:

> The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury."

Id. (citations omitted).

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[5] Clay also briefly argues this instruction shifted the burden of proof. We find no merit to this argument.

We conclude Clay failed to establish that the district court abused its discretion in instructing the jury on the reasonable doubt standard as it pertained to whether Clay acted knowingly. *See United States v. Rehak*, 589 F.3d 965, 972 (8th Cir.2009) (providing for an abuse of discretion standard of review). This instruction did not merely require that the jury find a "high probability" that Clay committed the offenses. Rather, the instruction stated that the jury must find beyond a reasonable doubt "that Alvin Clay was aware of a high probability" that money was being fraudulently obtained.

Moreover, the district court instructed the jury on the reasonable doubt standard in Jury Instruction # 5:

> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.

Clay does not argue the district court erred in its reasonable doubt instruction, nor can we discern any mistake in law on this instruction. Further, Clay has not established that there is a reasonable likelihood that the jury applied the instruction in an

unconstitutional manner. *See Victor*, 511 U.S. at 6, 114 S.Ct. 1239 ("The constitutional question . . . is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on [insufficient proof]."). We conclude that the jury instructions, taken as a whole, correctly conveyed the concept of reasonable doubt to the jury. *See id.* at 5, 114 S.Ct. 1239.

B. Willful Blindness Instruction

Clay next argues that the district court erroneously instructed the jury that it could infer knowledge of the conspiracy if it found Clay "deliberately closed his eyes to what would otherwise have been obvious to him." He maintains this willful blindness instruction undermined the requirement for knowledge and intent.

"A willful blindness instruction is appropriate when the defendant asserts a lack of guilty knowledge, but the evidence supports an inference of deliberate ignorance." *United States v. Gruenberg*, 989 F.2d 971, 974 (8th Cir.1993) (citation and quotations omitted). "Ignorance is deliberate if the defendants were presented with facts putting them on notice criminal activity was particularly likely and yet intentionally failed to investigate." *United States v. Whitehill*, 532 F.3d 746, 751 (8th Cir.2008). Evidence is sufficient to support such an instruction "if a jury could find beyond a reasonable doubt the defendants had either actual knowledge of the illegal activity or deliberately failed to inquire about it before taking

action to support the activity." *Id.* "If reasonable inferences support a finding the failure to investigate is equivalent to 'burying one's head in the sand,' the jury may consider willful blindness as a basis for knowledge." *Id.* (quoting *Gruenberg*, 989 F.2d at 974).

Here, the district court deemed such an instruction appropriate, reasoning:

> There were at least two invoices that were shown to Mr. Clay where they said supervised by Alvin Clay, and he admitted he had those contemporaneously with getting paid and he knows that he didn't supervise any work and did not inquire about any of that. And so that's evidence of some misrepresentation and deliberately looking away.
>
> The other thing that-the other part of the evidence that bothered-that made me think this might be an appropriate instruction had to do with the first transaction with Linda Jones in which Clay Construction Company got whatever the amount of the check was, I don't remember, and then got three cashier's checks for Ray Nealy's mother and to have that request of a general contractor from a subcontractor, don't pay me, don't pay my materialmen, don't pay my laborers, you know, write out three cashier's checks for my mother, that's the sort of thing that not inquiring about that seems to me evidence that would support giving that instruction.

Trial Tr. 1095-96.

Based on these facts, we agree with the district court that a jury could reasonably conclude that Clay either knew of the illegal activity or buried his head in the sand. Therefore, the court did not abuse its discretion in providing a willful blindness instruction.[6]

Clay asserts that the district court should have instructed the jury that the term "proceeds" meant "profits." Because Clay did not request this instruction, we review his claim for plain error. *See United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Clay has not established that the error, if any, affected the outcome of the proceedings. It seems unlikely that this definition affected the verdict because Clay's defense was not that he did not "profit" at least $10,000. Rather, Clay defended the charges by arguing that he did not knowingly participate in the money laundering scheme.

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[6] Clay also briefly argues that his convictions for money laundering should be set aside because the jury instructions misstated an element of the money laundering offense. He relies on *United States v. Santos,* 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008) (plurality opinion), which the Supreme Court decided on the fifth day of his trial. The Court in *Santos* determined ambiguous the term "proceeds," as used in 18 U.S.C. § 1956, and that "proceeds" should be defined as "profits." *Id.* at 2024-25.

V. Admission of Evidence

Clay argues the district court erred by admitting evidence that he had engaged in fraud when securing his contractor's license. He complains that the district court should not have permitted testimony from four witnesses who testified about the manner in which Clay obtained his contractor's license because it violated Federal Rule of Evidence 404(b).

Gregory Crow, the administrator of the Arkansas Contractors Licensing Board, testified that Clay applied for a contractor's license in 2001. Crow testified that the application required that Clay submit references from individuals for whom he had completed work. Clay's application listed Pat Joyner, Earl Jones, and Allan Nelson as references and included each of their alleged signatures. Crow testified that Clay swore on his application that his answers were true. Crow further testified that the Licensing Board would not have issued Clay a contractor's license if he included false information on his application.

Three other witnesses testified briefly that they were listed as references for Clay's application although Clay did not perform work on their homes. Pat Joyner testified that Clay never engaged in any contracting work for her, she did not fill out a reference form for him, and she did not remember signing a reference form. Earl Jones testified that he did not sign Clay's reference form, did not authorize anyone to submit the reference form on his behalf, and did

not know of Clay's experience in construction. Allan Nelson similarly testified.

Federal Rule of Evidence 404(b) provides that evidence of crimes by the defendant which are not charged in the indictment are generally inadmissible. *See United States v. Clemons,* 503 F.2d 486, 489 (8th Cir.1974). "However, evidence of other crimes is admissible for the purpose of providing the context in which the crime occurred." *United States v. Forcelle,* 86 F.3d 838, 841 (8th Cir.1996). As further explained in *United States v. Bass,* 794 F.2d 1305, 1312 (8th Cir.1986) (citations omitted):

> We have held that where evidence of other crimes is "so blended or connected, with the one[s] on trial as that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore is not governed by Rule 404(b).

The government argues the district court correctly admitted the evidence because the manner in which Clay obtained his contractor's license was intrinsic evidence of the fraudulent scheme upon which the wire fraud charges were based. The government asserts that Clay held himself out to be a legitimate contractor and allowed Nealy to use his contractor's

license to bill homeowners for repairs that were never completed.

We agree that the government's evidence that Clay fraudulently obtained his contractor's license helped "complete the story" of how he and his co-defendants allegedly committed wire fraud. The district court had a reasonable basis to admit this intrinsic evidence because Clay held himself out to be a legitimate contractor and used the license as part of the conspiracy. Thus, this evidence provided context for the charged offenses. The district court did not abuse its discretion in admitting this testimony. *See United States v. Johnson,* 463 F.3d 803, 808 (8th Cir.2006) (reviewing a district court's admission of evidence for an abuse of discretion).

VI. Exclusion of Evidence

Clay argues the government sought an indictment against him for these offenses because of the original prosecutor's animosity toward him, and that the district court should have allowed him to present evidence of this vindictive prosecution to the jury.

The Eighth Circuit has not addressed whether claims of prosecutorial vindictiveness should be addressed at trial. But other circuits have held that this issue should be addressed before trial. *See United States v. Abboud,* 438 F.3d 554, 579 (6th Cir.2006), *cert. denied,* 549 U.S. 976, 127 S.Ct. 446, 166 L.Ed.2d 309 (2006) ("[T]he district court's motion *in limine* was correct because the defense of selective prosecution is

a matter that is independent of a defendant's guilt or innocence, so it is not a matter for the jury."); *United States v. Berrigan,* 482 F.2d 171, 175 (3d Cir.1973) ("By both tradition and constitutional mandate the jury is given the responsibility of determining guilt or innocence according to instructions of law delivered by the court. The question of discriminatory prosecution relates not to the guilt or innocence of appellants, but rather addresses itself to a constitutional defect in the institution of the prosecution."). We agree that the selective prosecution of a criminal defendant is not an issue for the jury to decide. Rather, the district court should consider the matter before trial.

We review the district court's factual findings on a claim of prosecutorial vindictiveness for clear error. *See United States v. Leathers,* 354 F.3d 955, 962 (8th Cir.2004). After holding a hearing on Clay's selective prosecution claim, the district court concluded the government had not engaged in selective prosecution. In reaching this conclusion, the district court relied heavily on the testimony of the original prosecutor and the prosecutor's supervisor who both testified that they bore no animus toward Clay.

The district court also found that the manner in which this case began indicated that the prosecutor did not retaliate against Clay. This case began when Kenny Wright, a tax preparer, became concerned that he might face criminal charges because of his work for the conspirators. As a result of his concerns, Wright approached the government to discuss the case and implicated all three men. These facts indicate

that the prosecutor did not "drum up" these charges against Clay; rather, a person involved in the offense came forward to admit his wrongdoing.

The district court further found that the progression of this case also illustrated that the prosecutor did not engage in vindictive prosecution. The FBI agent testified that for several months he contacted this prosecutor to have the warrant reviewed, and the prosecutor stated he did not have time to review it. The case was then reassigned to a different prosecutor who eventually approved the affidavit. We agree with the district court's reasoning "[t]hat [the fact that the prosecutor] did not take the time to review the affidavit for the search warrant is wholly inconsistent with Clay's theory that [the prosecutor] was hell-bent on revenge."

Upon careful review, we are convinced that the district court adequately considered Clay's claim of selective prosecution pre-trial and its factual findings are not clearly erroneous.

VII. Motion to Suppress

The search warrant for Clay's offices relied on an FBI agent's affidavit regarding statements made by tax preparer, Kenny Wright. Clay argues that the affidavit in support of the search warrant lacked reliable and corroborated information. "We review the district court's factual determinations in support of its denial of a motion to suppress for clear error and its legal conclusions de novo." *United States v.*

Alexander, 574 F.3d 484, 488 (8th Cir.2009) (quotations and citations omitted).

The district court concluded that the warrant affidavit demonstrated Wright's veracity, and the magistrate judge correctly relied on Wright's information to find probable cause. The court found reliable Wright's statements that Nealy and McCuien solicited individuals to purchase homes, fraudulent construction invoices were prepared for Clay Construction which claimed that the work had been performed, and, at closing, checks were issued to Clay Construction even though no work had been performed. The court found Wright sufficiently reliable because he had met with FBI agents on three occasions, and he gave the agents Clay's social security number, two pay stubs, and lists of information Nealy had given him to prepare the false returns. The court reasoned that the FBI agents had a sufficient opportunity to assess Wright's credibility during the three meetings, and that the warrant demonstrated Wright's knowledge.

The district court also found that the FBI agent corroborated Wright's statements. The agent requested Clay and Nealy's tax return records for the previous three years and learned through the Secretary of State's website that Clay's corporate licenses had been revoked for failing to pay taxes. The agent then took an undercover agent to Nealy's office and recorded conversations. Based on this information, the agent prepared an affidavit in support of the search

warrant, and the magistrate judge issued the warrant.

The FBI agent's investigation sufficiently corroborated Wright's information. *See United States v. Williams,* 10 F.3d 590, 593 (8th Cir.1993). Therefore, the district court did not err in denying Clay's motion to suppress because the issuing judge had a substantial basis for concluding that probable cause existed.

VIII. Conclusion

We affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
EASTERN District of ARKANSAS

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
V.	Case Number: 4:04CR00274-01 JLH
ALVIN CLAY	USM Number: 23542-009
	J. Blake Hendrix
	Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) after a plea of not guilty. Counts 1ss, 2ss-5ss of Second Superseding Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 371 and 1343	Conspiracy to commit wire fraud, a Class D felony	3/27/2003	1ss
18 U.S.C. §§ 1957 and 2	Aiding and abetting engaged in monetary transaction in property derived from wire fraud (money laundering), Class C felonies	3/27/2003	2ss through 5ss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform act of 1984.

☐ The defendant has been found not guilty on count(s)

_____

☐ Count(s) N/A ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

August 28, 2009
Date of Imposition of Judgment

/s/ J. Leon Holmes
Signature of Judge

J. LEON HOLMES, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

August 28, 2009
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

FIVE (5) MONTHS on each count to run concurrently

☒ The court makes the following recommendations to the Bureau of Prisons:
The Court recommends defendant participate in vocational programs during incarceration.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ a _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☒ before 2 p.m. on **Tuesday, October 13, 2009**

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

THREE (3) YEARS on each count to run concurrently

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony,

unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL STANDARD CONDITIONS OF SUPERVISION

(4) Pursuant to 12 U.S.C. §§ 1785 and 1829, the defendant may not obtain employment in an institution insured by the FDIC or a Federal Credit Union.

(5) The defendant must disclose financial information upon request of the U.S. Probation Office, including, but not limited to, loans, lines of credit, and tax returns. This also includes records of any

business with which the defendant is associated. No new lines of credit will be established without prior approval of the U.S. Probation Office until all criminal penalties have been satisfied.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 500.00	$ 0	$ 16,265.26

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☒ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Linda Jones	$16,265.26	$16,262.26	
TOTALS	$ 16265.26	$ 16265.26	

Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6, may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 500.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D or, ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

During incarceration, defendant will pay 50 percent per month of all funds that are available to him. During residential reentry placement, payments will be reduced to 10 percent of the defendant's gross monthly income. Beginning the first month of supervised release, payments will be 10 percent per month of the defendant's monthly gross income. The interest requirement is waived.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Restitution will be joint and several with co-defendants Raymond Nealy (4:04CR00274-02 JLH) and Donny McCuien (4:04CR00274-03 JLH), and any other person convicted of an offense for which restitution to the same victim on the same loss is ordered.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 09-3134

United States of America

Appellee

v.

Alvin Clay

Appellant

Appeal from U.S. District Court for the Eastern District of Arkansas – Little Rock

(4:04-cr-00274-JLH-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 20, 2010

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

UNITED STATES OF AMERICA	)	No. 4:04CR00274-JLH-01, 02
v.	)	18 U.S.C. § 371
ALVIN CLAY and RAYMOND NEALY	)	18 U.S.C. § 1343 18 U.S.C. § 1957 18 U.S.C. § 2

SECOND SUPERSEDING INDICTMENT

(Filed Jun. 6, 2007)

THE GRAND JURY CHARGES THAT:

COUNT ONE

A. INTRODUCTION

At all times material to this Indictment:

1. ALVIN CLAY was the President of Clay Construction, Inc.

2. Clay Construction, Inc. was incorporated in the State of Arkansas on January 16, 2001. It's primary purpose was "construction work."

3. Clay Construction, Inc. maintained a checking account at Simmons First National Bank.

4. On January 26, 2001, ALVIN CLAY submitted a "New Applicant Questionnaire Form" to the State of Arkansas Contractors Licensing Board in

order to obtain a license to practice contracting in Arkansas.

5. RAYMOND NEALY was the President of Ideal Mortgage, Inc.

6. Ideal Mortgage, Inc. was incorporated in the State of Arkansas on April 3, 2002.

7. Donny McCuien was the President of McCuien Property Management and Construction, Inc. (hereinafter referred to as McCuien Management).

8. McCuien Management was incorporated in the State of Arkansas on October 23, 2002. Its primary purpose was "management of property."

9. ALVIN CLAY and RAYMOND NEALY shared office space at 323 Center Street, Little Rock, Arkansas.

10. McCuien Management did not maintain a business office.

B. MANNER AND MEANS

1. It was part of the conspiracy that RAYMOND NEALY and/or Donny McCuien would solicit individuals to purchase homes and apply for financing through Ideal Mortgage.

2. RAYMOND NEALY, doing business as Ideal Mortgage, contacted out-of-state lenders and secured financing for the purchasers he and others had solicited to buy homes.

3. RAYMOND NEALY would fax some, or all, of the following documents to the out-of-state lenders:

(a) Uniform Resident Loan Applications; and

(b) Offers to Purchase Real Estate.

4. The Uniform Resident Loan Applications that were sent to the lenders were false and fraudulent in some, or all, of the following respects:

(a) The actual sales price of the property was overstated;

(b) The property would not be the buyer's primary residence;

(c) Employment information was false;

(d) Monthly income was overstated;

(e) Cash on hand was fraudulently overstated; and

(f) Nonexistent assets were listed.

5. The Offers to Purchase Real Estate that were faxed to the lenders were false and fraudulent in some, or all, of the following respects:

(a) The signatures of the buyers were forgeries;

(b) The actual sales prices were fraudulently inflated and overstated; and

(c) The Offers to Purchase Real Estate faxed to the loan companies for homes located at 6404

Dove Lane, 10010 Chicot and 1611 West 16th Street failed to disclose Clay Construction was to receive a portion of the loan proceeds.

6. ALVIN CLAY, RAYMOND NEALY and others known and unknown to the Grand Jury, would prepare, or cause to be prepared, the following documents which were sent to the title companies prior to closing:

(a) Offers to Purchase Real Estate; and

(b) Invoices for Payment to Clay Construction.

7. The Offers to Purchase Real Estate were also false and fraudulent in some, or all, of the following respects:

(a) The buyers' signatures were forgeries;

(b) Multiple "Offers to Purchase" for the same residence were prepared that contained forged sellers' signatures;

(c) The actual sales prices were fraudulently inflated and overstated; and,

(d) The "Offers to Purchase" fraudulently stated Clay Construction either would do, or had done, rehabilitation work on the various residences for which it was entitled to be paid.

8. The Clay Construction invoices were false and fraudulent in that no "rehab" or construction work was performed nor was it ever intended to be performed.

9. After the home loans had been approved, the out-of-state lenders wire transferred money and funds in interstate commerce to the title companies in the Eastern District of Arkansas.

10. After the title companies received the false documentation showing money was owed to Clay Construction, they would draw checks payable to Clay Construction out of the loan proceeds.

11. Those checks would be cashed and the proceeds would be divided between ALVIN CLAY, RAYMOND NEALY, Donny McCuien and others known and unknown to the Grand Jury.

C. THE SCHEME TO DEFRAUD

From on or about August 2002 to on or about March 2003, in the Eastern District of Arkansas, and elsewhere, the defendants, ALVIN CLAY, RAYMOND NEALY, and Donny McCuien and others known and unknown to the Grand Jury, did combine, conspire, confederate and agree between themselves and others, known and unknown to the Grand Jury, to devise a scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations and promises from the purchasers of the following homes:

(1) 1614 South Park, Little Rock, Arkansas;

(2) 1122 West 21st, Little Rock, Arkansas;

(3) 6404 Dove Lane, Little Rock, Arkansas;

(4) 10010 Chicot, Little Rock, Arkansas; and

(5) 1611 West 16th, North Little Rock, Arkansas, by causing loan proceeds to be transmitted by means of wire communications in interstate commerce from the lending institutions to the title companies in the Eastern District of Arkansas, for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343.

D. OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed one or more of the following overt acts:

1614 South Park Street

1. On or about August, 2002, RAYMOND NEALY and others, known and unknown to the Grand Jury, met with Lorene Easter concerning the sale of a residence located at 1614 South Park Street, in Little Rock, Arkansas (hereinafter, Park Street residence).

2. On or about August 2002, Lorene Easter quoted RAYMOND NEALY a purchase price of $32,500.

3. On or about August 2002, RAYMOND NEALY approached Linda Jones regarding her purchasing the Park Street residence.

4. On or about August 2002, RAYMOND NEALY arranged financing for Linda Jones for the Park Street residence.

5. On August 27, 2002, RAYMOND NEALY furnished Linda Jones with money in order to overstate the balance in her bank account.

6. On or about August 27, 2002, RAYMOND NEALY caused a Uniform Residential Loan Application to be faxed to First Banc Mortgage in Tustin, California.

7. That loan application stated:

(a) The purchase price was $57,600.00;

(b) Linda Jones' income was $7,174.00 per month;

(c) Linda Jones had $5,000.00 cash on hand;

(d) Settlement charges would be paid out of Linda Jones' checking account;

(e) The property would be her primary residence; and

(f) Linda Jones was a Commander in the United States Army.

8. That loan application was false and fraudulent in the following respects:

(a) It overstated the purchase price;

(b) It overstated Linda Jones' income;

(c) It overstated Linda Jones' cash on hand;

(d) Settlement charges would not be paid out of Linda Jones' checking account;

(e) The property would not be her primary residence; and

(f) Linda Jones was not a Commander in the United States Army.

9. On or about August 2002, RAYMOND NEALY caused an Offer to Purchase Real Estate to be sent and delivered to Stewart Title of Arkansas stating the purchase price was $75,000.00; the seller was due $32,500.00 at closing; and Clay Construction was owed the balance. The signature of Linda Jones as "buyer" was a forgery.

10. On or about August 28, 2002, First Banc Mortgage caused loan proceeds to be wire transferred to Stewart Title Company in the amount of $56,742.72.

11. Those funds were for the purchase of the Park Street residence by Linda Jones.

12. On or about August 28, 2002, ALVIN CLAY caused an invoice to be faxed to Stewart Title Company reflecting that "Clay Construction" was owed $34,339.37 for "rehab" work done on the Park Street residence.

13. On or about August 28, 2002, Stewart Title Company, issued its check payable to Clay Construction in the amount of $33,939.51.

14. On or about August 28, 2002, ALVIN CLAY caused the Stewart Title Company check to be deposited into the Clay Construction checking account.

15. On or about August 28, 2002, ALVIN CLAY withdrew $33,939.51 from the Clay Construction checking account that was subsequently distributed to RAYMOND NEALY, ALVIN CLAY, and others known and unknown to the Grand Jury.

16. Neither Clay Construction nor any other building contractors or subcontractors did any rehabilitation or construction work on the Park Street residence.

1122 West 21st Street

17. On or about October 2002, RAYMOND NEALY negotiated the purchase of a residence at 1122 West 21st Street, Little Rock, Arkansas from the owner, George Hood (hereinafter, 21st Street residence). George Hood agreed to sell the 21st Street residence for $53,000.00.

18. On or about October 2002, RAYMOND NEALY contacted Linda Jones who agreed to purchase the 21st Street residence.

19. On or about November 4, 2002, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to Professional Land Title Company of Arkansas stating the purchase price was $88,000.00; the seller was due $53,000.00 at closing; and Clay Construction was owed the balance. The signature of Linda Jones as "buyer" was a forgery.

20. On or about December 9, 2002, RAYMOND NEALY furnished Linda Jones with $5,000.00 in order to inflate and overstate her bank account at the Arkansas Federal Credit Union.

21. Linda Jones gave RAYMOND NEALY a transaction report showing the $5,000.00 deposit.

22. RAYMOND NEALY arranged for Linda Jones to obtain financing at NovaStar Mortgage.

23. On December 12, 2002, RAYMOND NEALY caused a Uniform Residential Loan Application to be faxed to NovaStar Mortgage.

24. That loan application stated:

(a) The purchase price was $88,000.00;

(b) That Linda Jones had $6,000.00 cash on hand;

(c) That. Linda Jones was a Commander in the United States Army;

(d) That settlement charges would be paid out of her checking/savings account; and,

(e) The property would be her primary residence.

25. That loan application was false and fraudulent in the following respects:

(a) It overstated the purchase price;

(b) It overstated Linda Jones' cash on hand;

(c) Linda Jones was not a Commander in the United States Army;

(d) Settlement charges would not be paid out of Linda Jones' checking/savings account; and

(e) The property would not be her primary residence.

26. RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to Professional Land Title Company of Arkansas. That offer to purchase showed a purchase price of $88,000.00 and reflected that Clay Construction was owed approximately $35,000.00 for the rehabilitation of the 21st Street residence.

27. On December 11, 2002, NovaStar Mortgage caused loan proceeds of $79,436.87 to be wire transferred to Professional Land Title Company of Arkansas.

28. On or about December 12, 2002, ALVIN CLAY caused an invoice to be faxed to Professional Land Title Company of Arkansas showing that $31,511.50 was owed to Clay Construction for rehabilitation work done on the 21st Street residence.

29. On or about December 12, 2002, Professional Land Title Company of Arkansas issued a check in the amount of $31,511.50 payable to Clay Construction.

30. On or about December 12, 2002, ALVIN CLAY caused the $31,511.50 check to be deposited into the Clay Construction checking account.

31. On or about December 12, 2002, the proceeds of the $31,511.50 were distributed to RAYMOND NEALY, ALVIN CLAY, Donny McCuien, and others known and unknown to the Grand Jury.

32. Neither Clay Construction nor McCuien Property Management and Construction, Inc. did any rehabilitation or construction work on the 21st Street residence.

6404 Dove Lane

33. On or about November 2002, Donny McCuien contacted Hulen Morton who owned the residence located at 6404 Dove Lane, Little Rock, Arkansas (hereinafter, Dove Lane residence) and was quoted a purchase price of $25,000.00.

34. On or about November 2002, Donny McCuien told Rodney White he was aware of a residence on Dove Lane that would make a good rental property. Rodney White agreed to purchase the Dove Lane residence.

35. On or about November 2002, Donny McCuien introduced Rodney White to RAYMOND NEALY, RAYMOND NEALY arranged for Rodney White to obtain financing for the Dove Lane residence.

36. On December 11 and 16, 2002, RAYMOND NEALY provided Rodney White with money in order to inflate and overstate his checking account.

37. On or about December 17, 2002, RAYMOND NEALY caused a Uniform Residential Loan Application to be sent to New Century Mortgage in Tampa Florida.

38. That loan application stated:

(a) The purchase price was $47,700.00;

(b) That Rodney White had $7,500.00 cash on hand;

(c) That Rodney White earned $5,500.00 per month; and,

(d) The property would be his primary residence.

39. That loan application was false and fraudulent in the following respects:

(a) It overstated the purchase price;

(b) It overstated Rodney White's cash on hand;

(c) It overstated Rodney White's income; and

(d) The property would not be his primary residence.

40. On or about December 17, 2002, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to New Century Mortgage. That offer to purchase stated the purchase price for the Dove Lane residence was $53,000.00 and was purportedly signed by Rodney White and Hulen Morton.

41. On or about December 17, 2002, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to Professional Land Title Company of Arkansas stating the purchase price was $53,000.00; the seller was due $25,000.00 at closing; and, Clay Construction was owed the balance. The signature of Rodney White as "buyer" was a forgery.

42. On or about December 17, 2002, ALVIN CLAY caused an invoice to be faxed to Professional Land Title Company of Arkansas showing that $24,286.10 was owed to Clay Construction for "Rehabilitation to property located at 6404 Dove Lane."

43. On or about December 17, 2002, New Century Mortgage caused loan proceeds of $47,708.10 to be wire transferred to Professional Land Title Company of Arkansas.

44. On or about December 17, 2002, the loan for the Dove Lane residence was closed at Professional Land Title Company of Arkansas.

45. On or about December 17, 2002, Professional Land Title Company of Arkansas issued a check payable to Clay Construction for $24,286.10.

46. On or about December 19, 2002, ALVIN CLAY caused the $24,286.10 check to be deposited into the Clay Construction checking account.

47. On or about December 19, 2002, the proceeds of the $24,286.10 check were distributed between RAYMOND NEALY, ALVIN CLAY, Donny

McCuien, and others known and unknown to the Grand Jury.

48. Neither Clay Construction nor McCuien Property Management and Construction, Inc. did any rehabilitation or construction work on the Dove Lane residence.

10010 Chicot Road

49. On or about January 2003, Donny McCuien told Marcus Patillo that he could make money buying houses and renting them. Marcus Patillo agreed to buy a residence at 10010 Chicot Road (hereinafter, Chicot Road residence) for $35,000.00.

50. On or about January 2003 Donny McCuien introduced Marcus Patillo to RAYMOND NEALY who arranged financing for the Chicot Road residence.

51. In January 2003, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to New Century Mortgage in Irvine, California. A purchase price of $65,000.00 was marked out and $58,000.00 was written in its place. Paragraph 7 stated in part:

> "The seller is due $36,000 at closing. The remainder balance will be due to Clay Construction for the rehabilitation of the property."

52. On or about January 22, 2003, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to First National Title in Little Rock, Arkansas stating the purchase price was $58,000.00; the seller

was due $36,000.00; and, Clay Construction was owed the balance. The initials "MP" and "IB" on page 1 are forgeries. The signatures Marcus Patillo as "buyer" and Imron Bohra (sic) as "owner" on page 2 are forgeries.

53. On January 29, 2003, RAYMOND NEALY furnished Marcus Patillo with $6,500.00 in order to inflate and overstate his checking account.

54. On January 30, 2003, RAYMOND NEALY caused a second Offer to Purchase Real Estate to be faxed to New Century Mortgage. The second offer to purchase stated the purchase price for the Chicot Road residence was $58,000.00. Paragraph 7 deleted any mention of money being paid to Clay Construction for rehabilitation to the property.

55. On or about February 4, 2003, RAYMOND NEALY caused a Uniform Residential Loan Application to be faxed to New Century Mortgage.

56. That loan application stated:

(a) The purchase price was $52,200.00;

(b) That Marcus Patillo had $6,100.00 cash on hand;

(c) That Marcus Patillo earned $2,300.00 per month;

(d) That Marcus Patillo was Assistant Manager at Burger King;

(e) The property would be his primary residence; and

(f) Marcus Patillo owned a 1995 Acura Legend worth $7,000.00.

57. That loan application was false and fraudulent in the following respects:

(a) It overstated the purchase price;

(b) It overstated Marcus Patillo's cash on hand;

(c) It overstated Marcus Patillo's income;

(d) Marcus Patillo was not an Assistant Manager at Burger King;

(e) The property would not be his primary residence; and

(f) Marcus Patillo did not own a 1995 Acura Legend.

58. On or about February 4, 2003, RAYMOND NEALY gave Marcus Patillo $5,740.00 to pay closing costs for the loan.

59. On or about February 5, 2003, New Century Mortgage caused loan proceeds of $52,173.24 to be wire transferred to First National Title.

60. On or about February 5, 2003, the loan for the Chicot Road residence was closed at First National Title.

61. On or about February 5, 2003, ALVIN CLAY caused an invoice to be faxed to First National Title showing that $17,522.71 was owed to Clay Construction for rehabilitation to the Chicot Road residence.

62. On or about February 6, 2003, First National Title issued a check to Clay Construction for $17,522.71.

63. On or about February 6, 2003, ALVIN CLAY caused the $17,522.71 check to be deposited into the Clay Construction checking account.

64. The proceeds of the $17,522.71 check were distributed between RAYMOND NEALY, ALVIN CLAY, Donny McCuien and others known and unknown to the Grand Jury.

65. Neither Clay Construction nor McCuien Property Management and Construction, Inc. did any rehabilitation or construction work on the Chicot Road residence.

1611 West 16th Street

66. On or about February 2003, Donny McCuien told Robin Seals she could make money buying houses and renting them.

67. Robin Seals agreed to buy a home from Imran Bohra located at 1611 West 16th Street, North Little Rock, Arkansas (hereinafter, 16th Street residence).

68. On or about February 2003, RAYMOND NEALY arranged for Robin Seals to obtain financing

for the 16th Street residence from Encore Credit-Corporation, Irvine, California.

69. On or about February 19, 2003, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to Lenders Title Company in Little Rock, Arkansas stating the purchase price was $65,000.00; the seller was due $36,500.00 at closing; and, Clay Construction was owed the balance. The signature of Robin Seals as "buyer" was a forgery.

70. On March 17, 2003, RAYMOND NEALY caused a Uniform Residential Loan Application to be faxed to Encore Credit Corporation.

71. That loan application stated:

(a) The purchase price was $62,600.00;

(b) Robin Seals had $7,500.00 cash on hand;

(c) That Robin Seals earned $6,595.00 per month; and

(d) The property would be her primary residence.

72. That loan application was false and fraudulent in the following respects:

(a) It overstated the purchase price;

(b) It overstated Robin Seals cash on hand;

(c) It overstated Robin Seals income; and

(d) The property would not be her primary residence. The Uniform Residential Loan Application was not signed by Robin Seals.

73. On March 17, 2003, RAYMOND NEALY caused a "Statement of Earnings" to be faxed to Encore Credit Corporation stating Robin Seals earned $78,000.00 per year. Robin Seals did not earn $78,000.00 per year and her signature was forged on that document.

74. On or about March 19, 2003, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to Encore Credit Corporation stating the purchase price for the residence was $71,000.00. The signature of Robin Seals as "buyer" was a forgery.

75. On or about March 25, 2003, RAYMOND NEALY caused an Offer to Purchase Real Estate to be faxed to Lenders Title Company stating the purchase price for the residence was $71,000.00; the seller was due $35,500.00 at closing; and, Clay Construction was owed the balance. The signature of Robin Seals as "buyer" was a forgery.

76. On or about March 25, 2003, Encore Credit Corporation caused loan proceeds in the amount of $63,583.24 to be wire transferred to Lenders Title Company.

77. On or about March 25, 2003, ALVIN CLAY caused an invoice to be faxed to Lenders Title Company showing Clay Construction was owed

$25,882.41 for rehabilitation work on the 16th Street residence.

78. On or about March 27, 2003, Lenders Title Company issued a check to Clay Construction in the amount of $25,882.41.

79. On or about March 27, 2003, ALVIN CLAY caused the $25,882.41 check to be deposited into the Clay Construction checking account.

80. On or about March 27, 2003, the proceeds of the $25,882.41 check were distributed between RAYMOND NEALY, ALVIN CLAY, Donny McCuien, and others known and unknown to the Grand Jury.

81. Neither Clay Construction nor McCuien Property Management and Construction, Inc. did any rehabilitation or construction work on the 16th Street residence.

All in violation of Title 18, United States Code, Section 371.

COUNT TWO

On or about the 12th day of December, 2002, in the Eastern District of Arkansas, Western Division, the defendants, RAYMOND NEALY, ALVIN CLAY and others known and unknown to the grand jury, aiding and abetting each other, did knowingly engage in a monetary transaction through a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, that

is, by causing check number 1007, dated December 12, 2002, drawn on the "Clay Construction Account" payable to "McCuien Properties Donnie McCuien," in the amount of $21,511.50 to be cashed at Simmons First National Bank, Little Rock Branch, such proceeds having been derived from a specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Sections 1957 and 2.

COUNT THREE

On or about the 19th day of December, 2002, in the Eastern District of Arkansas, Western Division, the defendants, RAYMOND NEALY, ALVIN CLAY and others known and unknown to the grand jury, aiding and abetting each other, did knowingly engage in a monetary transaction through a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, that is, by causing check number 1009, dated December 12, 2003, (sic) drawn on the "Clay Construction Account" payable to "Donnie McCuien McCuien Construction," in the amount of $21,286.10, to be cashed at Simmons First National Bank, Little Rock Branch, such proceeds having been derived from a specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Sections 1957 and 2.

COUNT FOUR

On or about the 6th day of February, 2003, in the Eastern District of Arkansas, Western Division, the defendants, RAYMOND NEALY, ALVIN CLAY and others known and unknown to the grand jury, aiding and abetting each other, did knowingly engage in a monetary transaction through a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, that is, by causing check number 1011, dated February 6, 2003, drawn on the "Clay Construction Account" payable to "McCuien Properties/Donnie McCuien," in the amount of $15,522.71, to be cashed at Simmons First National Bank, Little Rock Branch, such proceeds having been derived from a specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Sections 1957 and 2.

COUNT FIVE

On or about the 27th day of March, 2003, in the Eastern District of Arkansas, Western Division, the defendants, RAYMOND NEALY, ALVIN CLAY and, others known and unknown to the grand jury, aiding and abetting each other, did knowingly engage in a monetary transaction through a financial institution, affecting interstate commerce, in criminally derived property of a value greater than $10,000, that is, by causing check number 1013, dated March 27, 2003, drawn on the "Clay Construction Account" payable to "Donnie McCuien/McCuien Properties," in the

amount of $23,300.00, to be cashed at Simmons First National Bank, Little Rock Branch, such proceeds having been derived from a specified unlawful activity, that is, wire fraud, in violation of Title 18, United States Code, Sections 1957 and 2.

(End of Text. Signature page attached.)